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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 104

ADAH ALBERTY, trading as ALBERTY'S FOOD PRODUCTS, ALBERTY'S FOOD LABORATORIES, THE ALBERTY FOOD LABORATORIES, CHENO LABORATORIES, CHENO PRODUCTS and U. S. OKEY,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

W. I. GILBERT, JR.,
~~CHARLES KARR~~, Charles H. Carr
939 Rowan Building, Los Angeles,
Attorneys for Petitioner.

Parker & Baird Company, Law Printers, Los Angeles.

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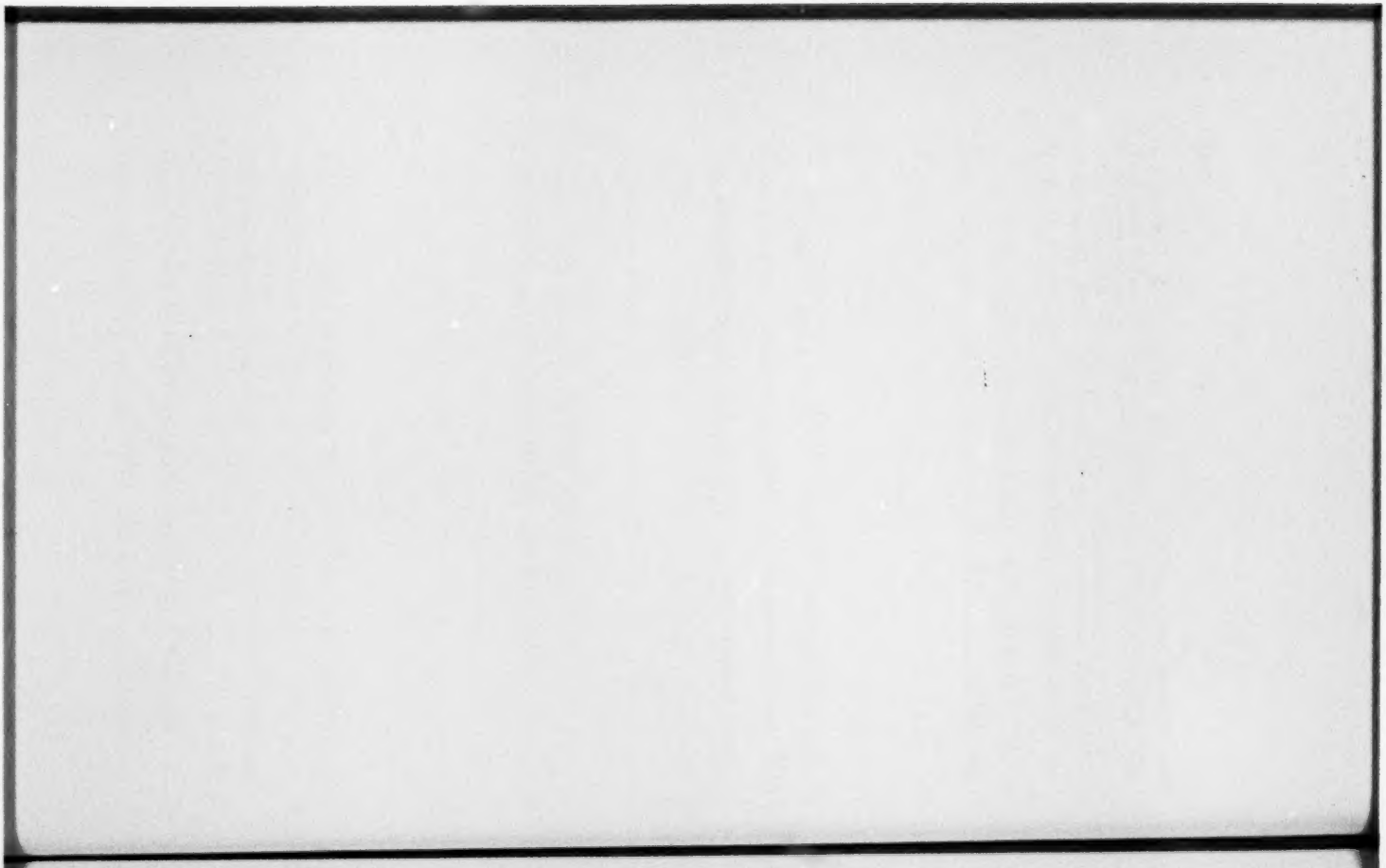

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Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Adah Alberty, petitioner herein, respectfully prays that this Honorable Court issue a writ of certiorari to review the decree of the United States Circuit Court of Appeals for the Ninth Circuit entered in the above entitled case on March 26, 1941 [R. 912-918]. This decree affirms a cease and desist order of the Federal Trade Commission of June 26, 1939 [R. 35-41].

Opinion Below.

The opinion of the Circuit Court of Appeal for the Ninth Circuit [R. 906-909], with the concurring opinion of one of the Justices thereof [R. 909-911] is reported in 118 Fed. (2d) 669.

Jurisdiction.

The decree of the United States Circuit Court of Appeals for the Ninth Circuit in this case was entered on March 26, 1941 [R. 912-918].

A petition for rehearing was filed within the time allowed by the rules of the Ninth Circuit and denied on April 21, 1941 [R. 919].

The jurisdiction of this Honorable Court rests on Section 240(a) of the Judicial Code of the United States (28 U. S. C. A. par. 347-a) and Section 2 of the Act of Congress of February 13, 1925, as amended, 43 Stats. 939 (28 U. S. C. A. par 348), under which cases in the Circuit Court of Appeals under Sec. 5 of "An Act to create a Federal Trade Commission, etc.," (38 Stat. 719; 15 U. S. C. A. §45) are included among the cases to which Section 240 of the Judicial Code applies.

Questions Presented.

1. In a proceeding to determine the alleged falsity and misleading character of advertising claims concerning the therapeutic value of foods, medicines and combinations of drugs, claimed to be compounded according to the teachings of the homeopathic school of medicine, may the Federal Trade Commission under its power to resolve conflicts in testimony, disregard or reject outright the unanimous testimony of experts adhering to the homeopathic school where there is a direct conflict between the teachings of the homeopathic school and the allopathic school of medicine and base its decision exclusively on the testimony of allopaths, thus making an arbitrary choice between two existing schools of healing?

It is claimed by petitioner that where different schools of medical thought exist, and where the factual truth of neither can be scientifically demonstrated, the correctness of the claims of one school should not be determined by the opinion of the adherents of the other school who are hostile to the first.

2. If, in passing on the claims of adherents to the homeopathic school of medication, the Commission relies solely on the testimony of adherents to the allopathic school does it not thereby nullify the policy of the Congress of the United States which gives express statutory recognition to the existence of a homeopathic theory of medication?

3. May the commission, in a proceeding to establish the truth or falsity of advertising claims, permit its own investigator to testify with the aid of "confidential" reports and memoranda without submitting the same to opposing counsel for inspection?

4. If certain expert witnesses of petitioner, adhering to the allopathic school, testified to the results of tests scientifically performed and stated that the tests demonstrated scientifically that Alberty's Food Instant and Alberty's Food Regular make milk more easily digestible, and if the Commission's witnesses who had no experience with those products stated that "there is no reason to believe" that they had therapeutic value and rendered milk more digestible, does the Commission under this state of the testimony have the power to reject the facts demonstrated by the experiments and adopt the opinion of its own expert witnesses unfamiliar with the products?

Statement.

Petitioner is engaged in the sale and distribution of health products, several of which are claimed to be compounded according to the homeopathic school of thought [R. 161, 162]. All of them are claimed to have certain therapeutic value.

These claims are advertised to the public through booklets, labels and other means, by which case histories are stated, and in which the alleged therapeutic properties of the products are set forth.

The Commission's complaint and notice [R. 2-13] attacked the various claims made by petitioner. After issue was joined, several hearings were had. Petitioner stipulated at the outset that certain claims were misleading and consented to their discontinuance [R. 142-160]. There finally resulted a modified cease and desist order on June 26, 1939 [R. 35-41]. This order, as well as the decree of the Circuit Court of Appeals affirming it [R. 912-918], not only prohibit specific claims theretofore made by petitioner, or claims similar to it, but also prohibit the making of any claims that either the products in question or any other preparations composed of "the same or similar ingredients", have any therapeutic value [R. 914-916].

During the course of the hearings adherents of two distinct schools of medical thought testified—allopathic physicians and homeopathic physicians. Between the testimony of the allopaths produced by petitioner and the allo-

paths called by the Commission, there is, in most instances, a sharp conflict.

However, the Commission did not produce experts from the homeopathic school of medicine, whereas all of the experts from that school which were called by petitioner unanimously testified that the preparations in question had therapeutic properties. Appendix A hereto contains a tabulation of the testimony on those parts of the order and decree to which petitioner took exception in the Circuit Court of Appeals.

In the course of the proceedings, and in order to impeach one of petitioner's witnesses, the Commission called its investigator who refreshed his memory by referring to his previous memorandum report to the Commission. This report was termed confidential, and although petitioner requested the privilege to inspect the memorandum, the Commission refused an inspection thereof on the ground that it was "confidential" [R. 416-419].

The Commission produced witnesses who had had no experience with Alberty's Food Regular and Alberty's Food Instant, and who had never used it. They stated that "they had no reason to believe" it had no therapeutic value and did not render milk more easily digestible [R. 316-317].

Petitioner on the other hand had some 200 experiments performed by experts in the laboratories of the University of Southern California, the results of their experiments, as well as a detailed description of the

manner in which they were performed, appears in the record [R. 577-599; 659-694], and establishes that the effect of the products on the digestion of milk is noticeable.

This statement, we believe, is sufficient to apprise this Honorable Court of the nature of the questions, a review of which we are earnestly seeking.

Specifications of Error.

It is claimed that the decree of the Circuit Court [R. 912-918] of Appeals as amplified by its opinion [R. 905-911] is erroneous in the following particulars:

First: In rejecting the contention of petitioner that the Commission has no power under the guise of passing upon conflicting claims of fact to make a choice between medical opinion by rejecting outright the testimony of experts adhering to the homeopathic school of medicine, and by accepting instead the opinions of the allopathic school;

Second: In holding that the Commission has the power to deny petitioner access to confidential reports to the Commission, if the same are used during the proceedings before the Commission for the purpose of refreshing the memory of the Commission's witnesses.

Third: In holding that the Commission has the power to accept the opinion evidence of its own experts in preference to facts established by scientific tests conducted by the experts of the opposite party.

Reasons for Granting the Writ.

I.

The decision of the United States Circuit Court of Appeals is in conflict with the opinion of this Honorable Court in *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 47 L. Ed. 90.

In that case the Postmaster General issued an order denying appellants the use of the mails, for the reason that he deemed their claims of healing fraudulent. Appellants believed that healing could be effected by the exercise of the faculties of the brain and mind, and were attempting to teach others in their art by sending instructions and advertising of their method through the mails. It was said in the opinion of this Honorable Court:

> "Unless the question can be reduced to one of fact as distinguished from mere opinion, we think these statutes cannot be invoked for the purpose of stopping delivery of mail matter. . . . We may not believe in the efficacy of the treatment to the extent claimed by complainants and we may have no sympathy with them in those claims, and yet their effectiveness is but a matter of opinion in any court."

II.

The decision is in conflict with the opinion of this Honorable Court in *Seven Cases v. United States*, 239 U. S. 510, 60 L. Ed. 411.

In this case certain medicines were condemned for being falsely and fraudulently misbranded. While upholding the seizure and the statute under which it was made, the Court points out that the realm of "honest differences of opinion" was expressly left untouched by the statute.

The Federal Trade Commission Act does not employ the terms "false and fraudulent"; but its references to "unfair" or "deceptive" (15 U. S. C. A., Sec. 45a) are, although broader, of similar import.

III.

The decision is in conflict with the policy of the Congress of the United States as expressed in the amendment to the Federal Trade Commission Act of March 21, 1938, Chapter 49, par. 4; 52 Stats. 114 (U. S. C. A. 15, par. 55-c) and the Federal Food, Drug and Cosmetics Act, U. S. C. A. Title 21, par. 321-g. These statutes provide that the term "drug" means, among other things,

> "articles recognized in the . . . official Homeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them".

These acts of Congress indicate a policy that articles may be claimed to be drugs, and may be claimed to have the properties of drugs if they are listed in the official reference works referred to. If the Federal Trade Commission is permitted to find that articles listed in those reference works do not have the properties referred to therein, or any other therapeutic properties the intent of Congress is nullified.

IV.

The decision, as far as it upholds the use of confidential memoranda by a witness of the Commission without submitting the memoranda to an inspection of opposite coun-

sel for cross-examination is in conflict with the policy of this Honorable Court that administrative bodies submit to the opposite party all evidence and documents which conceivably influence their decision, unless considerations of policy demand that the Government's sources of information remain secret. See:

Morgan v. U. S., 304 U. S. 18, 82 L. Ed. 1129;

U. S. v. Abilene, etc. Rd. Co., 265 U. S. 274, 68 L. Ed. 1016;

B. & O. R. Co. v. U. S., 264 U. S. 258, 68 L. Ed. 667.

V.

If there exists a limitation upon the power of the Federal Trade Commission to choose between conflicting opinions of different schools of medicine not subject to objective demonstration as facts, it is only apparent by analogy with the cases listed under reasons (I) and (II) above. There is, therefore, presented the novel and important question whether considerations of administrative policy require that such an unusual power should, or can validly be, lodged with the Federal Trade Commission.

VI.

The decision of the United States Circuit Court of Appeals touches the interests of all persons manufacturing, advertising and distributing medicines compounded according to homeopathic principles. Since the decree in a sweeping prohibition proscribes the making of any therapeutic

claims with respect to any medicines "similarly compounded", and since certain products so condemned contain multiple ingredients, the implications of the decision are of consequence to numerous persons other than petitioner. This is especially so because petitioner is informed that a resolution has been prepared by the Committee on the Pharmacopoeia of the American Institute of Homeopathy recommending the recognition of compounds of drugs in homeopathic dosages, whereas the decree and opinion in question, by prohibiting therapeutic claims with respect to any preparations "similarly compounded", will tend to make ineffective the apparent object of Congress to leave such matters to be worked out by the respective professional bodies (15 U. S. C. A. sec. 45d).

VII.

The power of the Commission under the express terms of the statute is to resolve conflicts "as to the facts" (15 U. S. C. A. par. 45).

While petitioner concedes that facts must often be established by opinion evidence, an opinion concerning a fact is of no evidentiary force when compared with an objective demonstration of such fact, and not sufficiently substantial to permit the Commission to prefer the opinion and to reject the objectively established fact.

Conclusion.

For the reasons stated it is believed that a decision by this Honorable Court herein will be in the public interest, in that it will create greater certainty with respect to the powers of the Federal Trade Commission in the field of conflicting medical opinion. It will also show whether, and to what extent, the Federal Trade Commission may render ineffectual the policy of Congress to recognize the homeopathic theory of medication as gathered from the Federal Trade Commission Act under which the agency operates. It will also determine whether administrative bodies may make use of confidential reports but withhold them from private persons.

Wherefore, it is respectfully submitted that this petition for writ of certiorari should be granted.

W. I. GILBERT, JR.,
CHARLES KARR,
Attorneys for Petitioner.

APPENDIX "A".

Table of petitioner's products condemned by Commission as therapeutically inactive, as to which petitioner claims the Commission could not arbitrarily reject the testimony of the homeopathic physicians or the results of scientific tests.

PREPARATION	Transcript Reference to Commission's Order	Transcript Reference to Testimony of Allopathic Physicians		Transcript Reference to Petitioner's Testimony of Homeopathic physicians.
		Testimony for Commission	Testimony for Petitioner	
Alberty's Food			582, 585	735
Regular	36	316, 841 853	597, 598 681, 770	
Alberty's Food Instant (new)	36	817		736
Alberty's Laxative Blend (German Herb Lax-Tonic)	37	321, 823	771, 787	740–742
Alberty's Phosphate	37	320, 818	696, 705	737, 792
Pellets (Nerve Food Pellets)			771	803, 807
Alberty's No. 3	37	321, 322	608, 708	745
Tablets (Alberty's Spleen and Iron Tablets)		829	709, 772	
Cheno Combination	37	321, 833	619, 629	747
Tablets (Restorex			712, 713	
Cheno Tablets)			772	
Cheno Herb Tea	37	825		
Diabetic	38	837	773	749

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Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Administrative Tribunals Should Not Undertake to Make an Arbitrary Choice Between Two Recognized and Existing Theories of Therapeutics and Determine as a Matter of Fact That the Claims of One School Are Erroneous by Rejecting the Unanimous Testimony of Adherents of That School and Adopting the Testimony of Adherents of a School Hostile to It.

(a) This Honorable Court, by way of analogy, has held that unless a question can be reduced to one of fact, as distinguished from mere opinion, an administrative

tribunal should not make a choice between the validity of opinions.

American School of Magnetic Healing v. J. N. McAnnulty, 187 U. S. 94, 47 L. Ed. 90.

The facts were briefly these: Appellants pretended to heal diseases and ailments by the exercise of faculties of the brain and mind. They were teaching others their art, and advertising their accomplishments through the mail. After a hearing the Postmaster General denied these people the use of the mail for the reason that their claims were deemed by him to be fraudulent. The Circuit Court of Appeals sustained the government's contention, but this Honorable Court said (47 L. Ed. p. 95):

> "Unless the question can be reduced to one of fact as distinguished from mere opinion we think these statutes cannot be invoked for the purposes of stopping the delivery of mail matter. * * * How far these claims are borne out by actual experience may be a matter of opinion. * * * One person may believe it of far greater efficacy than another but surely it cannot be said that it is a fraud for one person to contend that the mind has an effect upon the body and its physical condition greater than even a majority of intelligent people might be willing to admit or believe. Even intelligent people may and do differ among themselves as to the extent of this mental effect. * * * How can anyone lay down the limit and say beyond that they are fraud and false pretenses? His claim of the ability to cure may be vastly greater than most men would be willing to admit and yet those who might deny the existence or virtue of the remedy would only differ in opinion from those who assert it. * * *

> We may not believe in the efficacy of the treatment to the extent claimed by complainants and we may have no sympathy with them in those claims, and yet their effectiveness is but a matter of opinion in any court."
>
> *Seven Cases v. United States of America,* 239 U. S. 510, 60 L. Ed. 411.

In this case the United States filed libels to condemn certain drugs under the provisions of the Pure Food and Drug law. Extravagant statements concerning their curative effect appeared on the containers. The power of Congress to enact such a law was attacked on various constitutional grounds, and also upon the ground that the statute entered the domain of speculation. Disposing of that claim the court stated (60 L. Ed. 416):

> "Finally, the statute is attacked upon the ground that it enters the domain of speculation (American School v. McAnnulty, 187 U. S. 94, 47 L. ed. 90, 23 Sup. Ct. Rep. 33), and by virtue of consequent uncertainty operates as a deprivation of liberty, and property without due process of law, in violation of the 5th Amendment of the Constitution, and does not permit of the laying of a definite charge as required by the 6th Amendment. We think that this objection proceeds upon a misconstruction of the provision. *Congress deliberately excluded the field where there are honest differences of opinion between schools and practitioners.* Cong. Rec. 62 Cong. 2d Sess., vol. 48, part 12, Appx. p. 675. It was, plainly, to leave no doubt upon this point that the words 'false and fraudulent' were used. This phrase must be taken with its accepted legal meaning, and thus it must be found that the statement contained in the package was put there to accompany the goods with

actual intent to deceive,—an intent which may be derived from the facts and circumstances, but which must be established. *Id.* 676. That false and fraudulent representations may be made with respect to the curative effect of substances is obvious. It is said that the owner has the right to give his views regarding the effect of his drugs. But state of mind is itself a fact, and may be a material fact, and false and fraudulent representations may be made about it; and persons who make or deal in substances or compositions alleged to be curative are in a position to have superior knowledge, and may be held to good faith in their statements. (Citing cases.) It cannot be said, for example, that one who should put inert matter or a worthless composition in the channels of trade, labeled or described in an accompanying circular as a cure for disease, when he knows it is not, is beyond the reach of the lawmaking power. Congress recognizes that there was a wide field in which assertions as to curative effect are in no sense honest expressions of opinion, but constitute absolute falsehoods, and in the nature of the case can be deemed to have been made only with fraudulent purpose. The amendment of 1912 applies to this field and we have no doubt of its validity.'" (Emphasis added.)

(b) Where different schools of thought exist which are both practiced and where the subject truth of neither can be scientifically demonstrated, the correctness of the claims of one school should not be passed upon by the opinion of adherents of another school who are hostile to it.

Bush v. Cress, 181 Minn. 590, 233 N. W. 317;
Williams v. Marini, 105 Vt. 11, 162 Atl. 796;
78 *A. L. R.* 697—note at page 699.

(c) The Federal Trade Commission Act and the Pure Food and Drug Law recognize the existence of the homeopathic theory of medication separately and on an equal footing with the allopathic theory.

15 *U. S. C. R.*, par. 55-c.

21 *U. S. C. A.*, 321-c.

Dunn, Federal Food Drugs and Cosmetic Act, p. 822:

> "The bill (Food, Drugs and Cosmetic Act) is not intended to restrict, in any way, the availability of drugs for self-medication. On the contrary, it is intended to make self-medication safer and more effective."

The foregoing quotation, cited in *Dunn* op. cit. is contained in Committee Report No. 2139, Seventy-fifth Congress.

(d) The congressional debates on the Wheeler-Lee Act indicate that Congress considered, but thought unnecessary, certain provisions safeguarding the right of persons to disseminate their honest opinions with respect to the therapeutic value of medical preparations.

Dunn, Wheeler-Lee Act, pp. 170-172.

(The quotations in that book, set out in the appendix to this brief, are taken from the Committee Report to the House of Representatives, Seventy-fifth Congress, First Session, No. 163.)

II.

An Administrative Body Should Not be Permitted to Use at its Hearings Confidential Reports Made by its Investigators for the Purpose of Refreshing Such Investigator's Memory Without Exhibiting the Confidential Reports to the Opposite Side.

(a) Under the common law rules of evidence the opposite party has a right to examine any memorandum that is used by the opposite side for the purpose of refreshing its witness' memory.

> *Jones, Commentaries on Evidence,* Second Edition, vol. 5, pp. 4683-4685.

(b) While in England, in *Local Government Board v. Arlidge* (1915), A. C. 120, the use of a confidential report was considered proper, the use of such reports under the Constitution, is improper unless considerations of policy require that the Government's channels of information be kept secret.

Ernst Freund states in his *Administrative Powers Over Persons and Property,* p. 159, with respect to the value of *Local Government Board v. Arlidge* as a precedent in the United States:

> "It must, of course, be remembered that in England there are no constitutional requirements or limitations controlling statutory powers."

And on page 161 of the same work the author says of the *Arlidge* case:

> "The decision of the House of Lords cannot be considered otherwise than holding that upon the construction of the statute the applicant is not entitled to be informed of the entire case against him."

(c) The constitutional guarantees of due process as they exist in this country are held not to permit the consideration or use of any information in administrative proceedings which has not been submitted to the opposite party.

Morgan v. U. S., 304 U. S. 18 (82 L. Ed. 1129);

U. S. v. Abilene etc. R. Co., 265 U. S. 274 (68 L. Ed. 1016);

B. & O. R. Co. v. U. S., 264 U. S. 258, 44 Sup. Ct. 317, 68 L. Ed. 667.

(d) With respect to the propriety of permitting a witness to testify from a confidential memorandum to an administrative agency without submitting the same for inspection to the opposite party, the following language from the California case of *Kelliher v. Ray*, 43 Adv. Cal. App. 284, 285; 110 P. (2d) 712 should be persuasive:

> "In testifying he referred to his notes, stating he based his testimony upon such notes, and that without them he could not recall what measurements he had taken, as he had investigated many accidents between the date of that accident and his appearance in court.
>
> When counsel for plaintiff asked permission to examine the notes and demanded that they be placed in evidence the witness refused to produce them upon the ground they were confidential reports of the Motor Vehicle Department. The contention of the witness was upheld by the trial court, and it is the

refusal of the court to direct the witness to produce these notes that reversible error is here claimed."

The judgment of the trial court was reversed on the sole basis of this error.

(e) Toward the close of the opinion of the Circuit Court of Appeals [R. 909], the use of the confidential memorandum is discussed. It is stated that petitioner does not claim to have been prejudiced by this action. This assertion is based on a quotation of one sentence from petitioner's brief in which she stated that she could not be prejudiced if the confidential report was not used by the Commission in reaching its conclusion. From that statement the Circuit Court concludes that since no prejudice in using the confidential memorandum during the trial was shown, there was no prejudice in fact. We submit that this statement is obviously incorrect and misconstrues petitioner's language in her brief. Naturally, a litigant who is denied access to a confidential document submitted to an adverse witness is unable and powerless to demonstrate that a prejudice has resulted. It should be held that under such conditions the violation of the rules of evidence raises the presumption that there was prejudice.

III.

The Record Reflects a Conflict of Opinion on the Therapeutic Properties of Petitioner's Products Between the Homeopathic and Allopathic School of Medicine.

The concurring opinion [R. 909-911] states succinctly the problem which petitioner presented to the Circuit Court of Appeals. It says:

> "Petitioner does not question the rule that the findings of the Commission, if supported by evidence, are conclusive. She concedes that there is opinion evidence which supports the findings. Her position is that the Commission has no authority under the law to make an arbitrary choice between conflicting opinions of recognized schools of medicine. She says the rules of evidence require that 'where different schools of thought exist, which are both practiced and where the objective truth of neither can be scientifically demonstrated, the correctness of the claims of one school ought not to be passed upon by opinions of adherents to another school who are hostile to it.'
>
> If the case made before the Commission squarely presented the situation assumed, I think petitioner's argument would have to be sustained; but as I read the record it does not in any realistic fashion disclose a conflict between opposing schools of practice or opinion." [R. 910.]

Petitioner believes and respectfully submits that the record does reveal this "conflict between opposing schools

of practice or opinion." We refer to the tabulation at the end of our petition for the writ. It shows the various places in the transcript in which homeopathic physicians testified. These references show that the experts testifying at those places were adherents to the homeopathic school, and judged petitioner's products from the standpoint of homeopathic teachings.

Respectfully submitted,

W. I. GILBERT, JR.,
CHARLES KARR,
Attorneys for Petitioner.

APPENDIX "A" TO BRIEF.

Dunn, Wheeler-Lee Act, pp. 170-172, 318.

"A problem of some diffculty exists in the case of advertisements where there are differences of opinion. Perhaps the problem is most acute in the case of claims regarding the curative effect of drugs. The difficulty has two aspects—one of policy and the other of congressional power.

"As to the policy, there is no intention to punish an advertiser for making a statement which he had good reason to believe was true, if made in such manner as to be not misleading. On the other hand, it is not desired to permit an advertiser to make a representation as to therapeutic effect, for example, in such manner as to be misleading, merely because he can find some expert opinion to support his claim.

"As to the legal problem, it is a well-known principle of law that a statute providing punishment for the commission of an offense must describe the offense with a reasonable degree of certainty. There are clear implications in cases arising under the Food and Drugs Act of June 30, 1906, that Congress may not penalize the making of a statement or representation regarding the truth of which, qualified opinion differs. (Seven Cases v. United States, 239 U. S. 510: United States v. Johnson, 221 U. S. 488.) See also American School of Magnetic Healing v. McAnnulty (198 U. S. 94.)

"The reason for this limitation on the power of Congress is apparent. Whether an advertisement would be misleading in a material respect and thus be a false

advertisement, would depend, in a prosecution, on whether the jury found it to be misleading.

"If Congress were to provide that a representation, as to the correctness of which qualified opinion differed, would be misleading if the jury agreed with the experts holding one view, but not misleading if the jury agreed with the experts holding the other view, it will be seen that the advertiser would not be able to tell in advance whether his advertisement violated the statute. There would therefore exist the kind of uncertainty which would invalidate the statute. On the other hand, it is undesirable to permit misleading claims to be made simply because experts can be found to substantiate them.

"It is in the light of these considerations that the committee on the advice of the House Legislative Counsel, included in the definition of 'False Advertisement' the following provision:

> 'but if, at the time of the dissemination of the advertisement, there exists a substantial difference of opinion, among experts qualified by scientific training and experience, as to the truth of a representation, the advertisement shall not be considered misleading on account of such representation, if it states clearly and prominently the fact of such difference of opinion. Nothing in this paragraph shall be construed as requiring the making of such statement as to difference of opinion; and failure to so state the fact of such difference of opinion shall not relieve the Government of the burden of establishing the misleading character of the representation.'

"This provision does not increase the burden of the accused in making his defense, but affords him an opportunity for his own protection where uncertain as to his rights.

"What this provision does is to afford the advertiser a means of knowing how he can, with certainty, establish his innocence under the statute, thus removing the danger of invalidity growing out of alleged uncertainty. It applies only in the narrow class of cases where such difference of opinion exists, and it does not, it should be noted, require the inclusion in the advertisement of a statement as to the difference of opinion. Whether or not such a statement is included, the basic question as to whether the advertisement is misleading always remains to be determined.

"It is to be noted that the difference of opinion involved is one existing at the time the advertisement is disseminated. Therefore, if it is necessary to establish in court the existence of such a difference of opinion, it will be done by testimony as to the state of expert opinion on the trial or by testimony of individual experts as to their opinion regarding the truth of the representation. There is no obligation on the advertiser to publish a statement that there is a difference of opinion as to the product he advertises. He may avail himself of such a defense if he desires to do so. Whether or not he does so does not relieve the Government of carrying its burden of establishing the misleading character of the false

advertisement. Thus the misleading character of the representation will be a burden for the prosecution to prove in every case and the truthfulness of the representation may be a defense in every case (pp. 170-172).

* * * * * * * * *

"The new section 15 (a), in section 2 of the House Amendment, relating to the definition of the term 'False advertisement' contained a provision that if, at the time of the dissemination of an advertisement, there existed a substantial difference of opinion among experts as to the truth of a representation, the advertisement should not be considered misleading on account of such representation if it stated clearly and prominently the fact of such difference of opinion. There was no similar provision in the Senate bill. After consideration in conference the House conferees concluded that this language was unnecessary for the purpose of the legislation and the conference agreement eliminates this provision from the House amendment" (p. 318).

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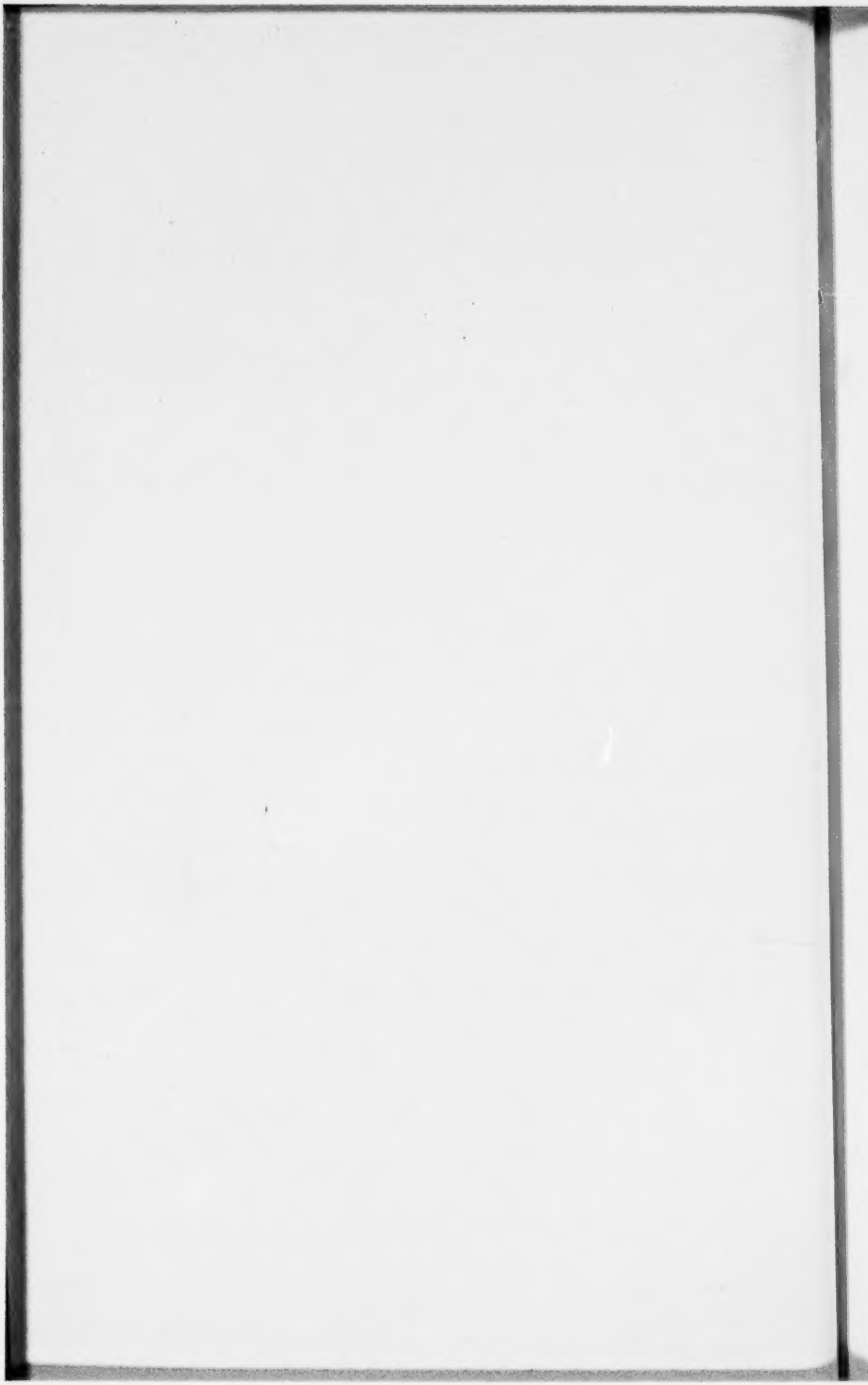

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 104

ADAH ALBERTY, TRADING AS ALBERTY'S FOOD PRODUCTS, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The majority (R. 906–909) and concurring (R. 909–911) opinions in the Circuit Court of Appeals are reported in 118 F. (2d) 669.

JURISDICTION

The Circuit Court of Appeals entered its decree on March 26, 1941 (R. 912–918), and denied a petition for rehearing on April 21, 1941 (R. 919). The petition for writ of certiorari was filed May 26, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether findings by the Commission which are supported by substantial evidence are nevertheless unauthorized or illegal if there is a conflict in the evidence and some of the conflicting evidence consists of testimony given by witnesses subscribing to a particular theory of medication.[1]

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, c. 311, 38 Stat. 719 (15 U. S. C., § 45), provides in part as follows:[2]

> That unfair methods of competition in commerce are hereby declared unlawful.
>
> * * * * *
>
> * * * the findings of the commission as to the facts, if supported by testimony, shall * * * be conclusive.

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[1] Petitioner also seeks to present the question whether the trial examiner erred in refusing to allow petitioner's counsel to examine a document used by a Commission witness to refresh his recollection. As we point out later (*infra*, pp. 8–9), the testimony given after examination of the document did not relate in any way to the portions of the Commission's order which petitioner is attacking and the question sought to be raised is therefore outside the issues in this proceeding.

[2] The Commission instituted this proceeding before, but concluded it after, Section 5 was amended by the act of March 21, 1938, c. 49, 52 Stat. 111 (15 U. S. C., Supp. V, § 45). The amendments are not pertinent to the questions presented in this case.

STATEMENT

The Commission instituted a proceeding under Section 5 of the Federal Trade Commission Act by a complaint charging petitioner with selling in interstate commerce some 20 baby foods and alleged health preparations by means of numerous specified false and misleading representations (R. 2–11). Petitioner in her answer admitted that in these sales she was in substantial competition with various other concerns engaged in the interstate sale of like products (R. 3, 14), and near the beginning of the hearings petitioner stipulated that she had made a wide variety of exaggerated and misleading statements constituting the use of unfair methods of competition (R. 142–160).

After an extended hearing the Commission found that various representations by which petitioner promoted the sale of her products were false, deceptive, or misleading (R. 19–34) and it entered a cease and desist order prohibiting such representations in connection with interstate sales (R. 36–41). The prohibited representations are set forth in 21 separate paragraphs of the order. Of the 21, petitioner questions the validity of only five (R. 906–907).[3]

[3] Paragraphs (1), (3), (5), (6), and (7) (R. 36, 37–38). Among important provisions of the order not attacked by petitioner are those barring her from representing that her products increase or stimulate sex activity (pars. (4), (9), and (10), (13) in conjunction with (14), (15)) (R. 37, 38, 39–40).

The court below held that the Commission's findings "are supported by substantial evidence and hence are conclusive" (R. 908). The court pointed out that not only had the Commission not rejected the testimony of adherents of the homeopathic school of medicine but that the testimony of such adherents gave some support for the findings (*id*). The concurring opinion deals with this aspect of the case somewhat more fully and reaches the same conclusion (R. 909–911).

ARGUMENT

I

Petitioner's contention that the Commission erred in basing its findings upon the testimony of representatives of one school of medical thought, in disregard of testimony given by representatives of another school, constitutes an admission that there is evidence to support the findings.[4] The law is settled that where there is such evidence the Commission's findings are conclusive and that, upon judicial review, the question of the weight of the evidence is not open for consideration. *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 73. Furthermore, certiorari will ordinarily not be granted merely to review the question of whether there is sufficient evidence to sustain the

[4] See also references to evidence supporting the findings, Appendix A of the petition for certiorari, p. 13.

findings of an administrative body. *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U. S. 206, 208.

Petitioner seems to contend that the representations which she made have the support of one school of medical thought, that the Commission is not authorized or competent to determine which of two conflicting medical theories is valid, and that the Commission therefore acted arbitrarily in finding that representations which are endorsed by a recognized school of medical thought are false and misleading. The short answer to this contention is that it assumes a state of facts—that those subscribing to homeopathic theories of medication endorse the representations made by petitioner—which the evidence does not establish. That the case does not present the legal issue which petitioner seeks to raise is clearly stated in the concurring opinion in the court below, as follows (R. 911):

> There is no showing by homeopathic doctors generally that these alleged remedies, as put together by petitioner, have the support or endorsement of the homeopathic school. At most there is testimony by doctors of that school that some one or more of the ingredients used in several of the preparations are recognized as having therapeutic value. * * * In short, petitioner's theory of the case does not substantially fit the facts.

Certain evidence warranting the above observations is summarized below.[5]

But petitioner's contention, even if the necessary factual foundation therefor had been laid, would still be without merit. It is as much within the province of the Commission to determine an issue of fact which requires consideration of conflicting testimony by medical experts as to determine any other factual issue involving the weighing of conflicting evidence.[6] In *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643, the Commission's findings as to misrepresentation were based upon the testimony of medical experts and their testimony was conflicting.[7] While this Court set aside the Commission's order upon the ground that there

---

[5] Petitioner's preparations generally contain numerous ingredients in minute quantities (R. 25–29, 911), but two of the three homeopaths upon whose testimony petitioner relies testified that the generally accepted homeopathic theory or practice was to prescribe drugs separately, not in combination (R. 756, 810).

One of the three homeopaths testified that he had never used the combination of ingredients found in petitioner's phosphate pellets (R. 757), in her No. 3 tablets (R. 762), in her Cheno tablets (R. 763), in her herb laxative pellets (R. 763–764), or in her Alberty's formula (R. 764–765). The cross-examination of the other two homeopaths was not as inclusive, but each of them when questioned as to the phosphate pellets testified that he had not used this particular combination of ingredients (R. 795–797, 809–810).

[6] *Justin Haynes & Co., Inc.* v. *Federal Trade Commission*, 105 F. (2d) 988, 989 (C. C. A. 2d).

[7] See *Raladam Co.* v. *Federal Trade Commission*, 42 F. (2d) 430, 433–434 (C. C. A. 6th).

was no proof that the respondent's practices were injurious to actual or potential competitors, it stated (p. 646) that the Commission's findings as to misrepresentation were "supported by evidence" and that if such findings "were all that is necessary to give the Commission jurisdiction, the order could not successfully be assailed."

In *E. Griffith Hughes, Inc.* v. *Federal Trade Commission,* 77 F. (2d) 886 (C. C. A. 2d), this Court denied a petition for writ of certiorari which presented substantially the same question as that urged in the present case (296 U. S. 617).

The cases cited by petitioner seem wide of the point. *American School of Magnetic Healing* v. *McAnnulty,* 187 U. S. 94, was a proceeding to enjoin a fraud order issued by the Postmaster General under a statute authorizing him to prohibit obtaining money through the mails by means of "false or fraudulent" representations. The bill alleged that complainant's business was founded on the proposition that human ills can be cured through proper exercise of the faculties of the brain and mind and was "confined to practical scientific treatment" based on this doctrine. This Court, treating these allegations as statements of fact, held that it was erroneous to sustain a demurrer to the bill and it remitted the case to the District Court for trial upon the merits. The decision has no application to a proceeding under section 5 of the Trade Commission Act to prohibit unfair methods of competi-

tion. In such a proceeding, "innocence of motive" is no defense and the statute applies to "misrepresentation, however innocently made." *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 81.

Seven Cases v. *United States*, 239 U. S. 510, upon which petitioner also relies, was a proceeding to condemn certain drugs as being misbranded, the statute providing that a drug was misbranded when there was an accompanying "false and fraudulent" statement regarding its curative effect. The Court sustained the validity of the statute and of the libel filed thereunder, saying (p. 517) that there obviously could be false and fraudulent representations with respect to curative effect and that whether such representations had been made or not was a question of fact to be determined upon the evidence like any other material fact.

II

Petitioner complains of the trial examiner's refusal to permit her counsel to examine a document which a Commission witness had used to refresh his recollection. The testimony thus refreshed concerned the falsity of the case history, as advertised by petitioner, of a user of her products (R. 413, 416–419, 422–425; see also R. 101–102). The only paragraph of the Commission's order to which this testimony is relevant is paragraph (19) which prohibits advertising by means of false case histories (R. 40). Since in the court below petitioner did

not specify error as to this paragraph (R. 906–907), any possible error in the examiner's ruling lies outside the issues presented to this Court. Furthermore, as the court below said, petitioner failed to make any showing of prejudice (R. 909). The witness stated that he had an independent recollection of the interview concerning which he testified and that his purpose in examining his notes of the interview was to make certain that his testimony would be correct (R. 419).[8]

CONCLUSION

The petition for a writ of certiorari presents no question requiring review by this Court and we therefore respectfully submit that it should be denied.

CHARLES FAHY,
Acting Solicitor General.
THURMAN ARNOLD,
Assistant Attorney General.
CHARLES H. WESTON,
Special Assistant to the Attorney General.
W. T. KELLEY,
Chief Counsel,
Federal Trade Commission.

JUNE 1941.

[8] The Commission's counsel waived any objection to inspection by petitioner's counsel, but the examiner felt bound by the Commission's general rule that reports of interviews by members of its staff are to be held confidential (R. 417–418, 420–421).

U. S. GOVERNMENT PRINTING OFFICE: 1941